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No. 86-1829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT INDEPENDENT U.S. TANKER OWNERS COMMITTEE IN OPPOSITION

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QUESTION PRESENTED

Whether the court below exceeded the permissible scope of review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982), in vacating a rulemaking on the ground that the Secretary failed to explain "how her decision to adopt this rule and reject alternative measures by relying on policies of competition and deregulation can be squared with the statutory objectives that Congress specified as the primary guidelines for administrative action in this area." 809 F.2d at 854, Pet. App., p. 14a.

LIST OF PARTIES

The parties appearing in the proceeding below are set forth in page (ii) of the Petition.*

* Rule 28.1 Statement. Respondent Independent U.S. Tanker Owners Committee is an unincorporated association representing various corporations engaged in U.S. flag tanker operations.

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Respondent Independent U.S. Tanker Owners Committee ("ITOC") submits this brief in opposition to the petition of Atlantic Richfield Company ("Arco") for a writ of certiorari.[1]

OPINIONS BELOW

The opinion and order of the court of appeals is reported at 809 F.2d 847 and is reprinted in the Appendix to the Petition, at p. 2a. The memorandum deci-

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[1] In the court below and in the District Court this action was styled Independent U.S. Tanker Owners Committee v. Elizabeth H. Dole, Secretary, U.S. Department of Transportation, *et al.* In those proceedings Arco was, respectively, an appellee and a defendant-intervenor. In this Court Arco is the petitioner. The Secretary of Transportation and the Department of Transportation have not sought review in this Court.

sion and order of the United States District Court for the District of Columbia (Jackson, D.J.) is reported at 620 F. Supp. 1289 and is reprinted in the Appendix to the Petition, at p. 16a.

JURISDICTION

The court of appeals entered its judgment on January 16, 1987. It denied timely petitions for rehearing on March 24, 1987. Pet. App. 1a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Two sections of the Administrative Procedure Act are involved in the petition. 5 U.S.C. § 553(c) (1982) provides in relevant part:

> After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. § 706(2)(A) (1982) provides in relevant part:

> The reviewing Court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions, found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Also involved is the Merchant Marine Act, 1936, as amended, 46 U.S.C. §§ 1101 ff., and particularly its statement of purpose, Section 101, 46 U.S.C. §§ 1101.

STATEMENT OF THE CASE

Owners of vessels built with construction-differential subsidy under Title V, Merchant Marine Act, 1936, §§ 501 ff., 46 U.S.C. §§ 1151 ff. ("Act"), are required by Section 506, § 1156, to operate exclusively in the foreign trade of the United States. In May 1985, the Secretary of Transportation adopted a rule allowing all owners of subsidized tankers to enter the domestic trade upon repaying the subsidy with interest. 50 Fed. Reg. 19170 (May 7, 1985). On review, the court of appeals held that although the Secretary has statutory power to adopt such a rule, her specific findings respecting its conse-

quences in the actual circumstances raised serious question of its consistency with the statute, especially since her reasons for adopting the rule were on their face not mentioned as among the statutory objectives and she had failed to explain how they advanced or were consistent with such objectives. 809 F.2d at 852-54; Pet. App., pp. 10a-14a. The court was unwilling to say that no such explanation could be found and accordingly vacated the rule, withholding its mandate for a period of six months in order to allow further proceedings. 809 F.2d at 854-55; Pet. App. pp. 14a-15a.

On April 15, 1987, the Department of Transportation, acting through the Maritime Administration, published a notice of proposed rulemaking to adopt a rule to allow four tanker vessels that had repaid their construction differential subsidies to remain in the domestic trade. 52 Fed. Reg. 12199 (April 15, 1987). Three of these vessels had repaid the subsidy pursuant to the May 1985 rule; the fourth had repaid pursuant to an earlier rule which had been earlier vacated. *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982). On April 24, 1987, the House of Representatives passed the Supplemental Appropriations Bill for Fiscal Year 1987 which included a provision prohibiting the Department or the Maritime Administration from expending funds to propose, promulgate or implement any rule relating to the repayment of construction-differential subsidies except insofar as such an expenditure relates to a rule which confirms to statutory standards thereafter enacted by Congress. On June 22, 1987, the Department published a final rule allowing the four vessels to remain in the domestic trade. 52 Fed. Reg. 23522 (June 22, 1987). On July 1, 1987, Congress passed the Supplemental Appropriations Bill for Fiscal Year 1987 which included the prohibition on the Department's or Maritime Administration's expenditure of funds in connection with the repayment of subsidies. On July 11, 1987, the President signed the Supplemental Appropriations Act into law.

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied because the petition does not present a substantial question of federal law.

1. Petitioner complains that the court below should have decided for itself whether the reasons advanced by the agency for its rule were inconsistent with the statute. But it has long been the responsibility of administrative agencies, not only to conform their actions to the requirements of governing statutes, but also to demonstrate such conformance. Thus, in *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197 (1941), affirming the vacation of an NLRB reinstatement order, the Court said, "All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it." In *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (*"Chenery I"*), the Court vacated an SEC remedial order because the agency failed to demonstrate the conformity of its order with governing law:

> It is not for us to determine independently what is "detrimental to the public interest or the interest of investors or consumers" or "fair and equitable" within the meaning of §§ 7 and 11 of the Public Utilities Holding Company Act of 1935. The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding.[2]

In a later decision in the same matter the Court emphasized the "simple but fundamental rule of administrative law" of *Chenery I*:

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[2] Petitioner's argument here that the requirement of a reasoned analysis is a "procedural" requirement was considered and rejected in *Chenery I* (318 U.S. at 95): "We are not enforcing formal requirements."

> That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 196 (1947) (*"Chenery II"*).

Chenery I and *II* established the deep-seated principle that the agency's action must be upheld, if at all, on the basis of its own reasoning, and, if that reasoning is inadequate, the court may not substitute its own. Thus, in the recent decision *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), the Court cited, as its primary example of "an arbitrary and capricious" agency rule, one in which "the agency has relied on factors which Congress has not intended it to consider." That is the precise charge made against the Secretary's rule here. In *State Farm* the Court continued, citing *Chenery II*, "The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.*

2. The "considerable doubt" that the court below expressed concerning the rule's conformity with "the objectives set out in the Merchant Marine Act" (809 F.2d at 855; Pet. App., p. 15a) can best be judged by the facts of this case.

In the interest of national defense and commerce, § 101 of the Act, 46 U.S.C. § 1101, in terms prescribes a merchant marine that is to be (1) privately owned, (2) sufficient to carry all our domestic commerce, (3) sufficient to carry a substantial part of our foreign commerce. (4) suitable for defense service in war, (5) made up of the best equipped, safest and most suitable types, (6) con-

structed in the United States and supported by efficient building and repair facilities, and (7) manned by trained citizen seamen.

In her statement of basis and purpose, which effectively incorporated a regulatory impact analysis ("RIA") (J.A. 1049)[3] as a more detailed explanation of her action, the Secretary made the following findings as to the rule's consequences:

(1) It would displace the full-time equivalent of 13 handy-size tankers that the Department of Defense and Department of the Navy in officially opposing the rule said would amount actually to 20 or 24 militarily useful ships important for national defense.[4]

(2) It would cause the loss of jobs for 800 seamen.[5]

(3) It would on its face allow total abandonment of the foreign tanker trade.[6]

(4) It would definitively preclude further tanker building.

On the other hand, the Secretary found that if she did not adopt the rule, "The benefit of this option is that it would not result in defaults on Jones Act tankers or any adverse impacts on 'handy-sized' tankers, maritime labor,

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[3] "J.A." refers to the Joint Appendix in the court of appeals.

[4] The Secretary advised the Department of Defense to use foreign ships in case of emergency. 50 F.R. 19174 Col. 2.

[5] The Secretary said that the cost of their unemployment compensation would, after all, amount to only 0.3% of the fall in freight rates she expected would result from the rule over 10 years. RIA 34-36; J.A. 1085-87.

[6] The court of appeals observed that this would tend to reduce the fleet to the size of domestic demand alone, contrary to the statutory purpose of maintaining shipping sufficient to carry not only all our domestic commerce but also a substantial part of our foreign commerce. The Secretary argued that although ships transferred to domestic trade would no longer be subsidized, they would still be "available" for foreign trade; but how they could compete without subsidy she did not explain. 50 F.R. 19174 Col. 1.

or existing tanker owners. Demand for new crude tankers [might] bring work to U.S. shipyards and could possibly materialize later this decade, but this is speculative." RIA 40; J.A. 1091.

That is, the Secretary found that her rule would have ascertained negative effects for all the explicit purposes of the Act, and that failure to adopt it would avoid these negative effects.

Why then did she adopt it? She recited a series of anticipated benefits [7] summarized by the court of appeals as "economic efficiency," "use of underemployed resources," "increased competition" and "deregulation," 809 F.2d at 853; Pet. App., p. 33a, which she said would result in an industry "more competitive and efficient in the future," and particularly in very large "savings" to shippers over a period of 10 years. 50 F.R. 19172 Cols. 2, 3; *id.* 19173 Col. 3; *id.* 19175 Col. 3. The savings were to result from entry of the subsidized fleet, which would introduce such acute competition that she predicted freight rates would fall to the level of break-even for the most efficient tonnage, break-even being defined as operating costs plus debt service. RIA 21 (J.A. 1072) and notes 6, 7; 50 F.R. 19175 Col. 3. If the most efficient ships would earn no profits for 10 years, how would fare the rest of the industry?

We agree with petitioner that the court of appeals might well have stricken down the rule—and we urged it to do so—on the straightforward ground that a purpose to bring about such consequences is plainly incompatible with the statutory duty of the Secretary to promote and develop the national merchant marine in the highest interests of state. But petitioner is in no position to complain because the Court gave so much deference

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[7] These benefits included greater tax revenues for the United States and for the State of Alaska and recovery of subsidy funds previously laid out for ship construction. 50 F.R. 19172 Col. 3; *id.* 19177 Col. 1.

to the Secretary as to leave open the possibility that upon further consideration she might be able to show, as she clearly had not done here, that her action is somehow reconcilable with the purposes and policy of the Merchant Marine Act.

3. Petitioner also complains that the court of appeals should not have required the Secretary to explain why she did not adopt possible alternative courses of action. The Court here merely followed the Secretary herself, who explored no fewer than 13 different "options," and gave reasons for rejecting the others that were again unrelated to the apparent purposes and policy of the Merchant Marine Act. RIA 38-42. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., supra*, at 51.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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